

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Contel of the South, Inc. d/b/a Verizon Mid-	)	
States, Verizon California Inc., The Micronesian	)	
Telecommunications Corporation, Verizon	)	
Delaware Inc., Verizon Florida Inc., Verizon	)	
Maryland Inc., Verizon New England Inc.,	)	File No. EB-05-MD-007
Verizon New York Inc., Verizon New Jersey Inc.,	)	
Verizon North Inc., Verizon Northwest Inc.,	)	
Verizon South Inc., Verizon Pennsylvania Inc.,	)	
GTE Southwest Inc., Verizon Washington, D.C.	)	
Inc., and Verizon West Virginia, Inc.,	)	
	)	
Complainants,	)	
	)	
v.	)	
	)	
Operator Communications, Inc.,	)	
	)	
Defendant.	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: December 21, 2007**

**Released: January 4, 2008**

By the Commission: Commissioner Copps concurring and issuing a statement.

**I. INTRODUCTION**

1. In this Memorandum Opinion and Order, we grant in part a formal complaint<sup>1</sup> filed by the Verizon Telephone Companies<sup>2</sup> against Operator Communications, Inc. (“OCI”) pursuant to section 208 of the Communications Act of 1934, as amended (“Act”).<sup>3</sup> Verizon alleges that OCI violated sections 201 and 276 of the Act<sup>4</sup> by failing to pay Verizon payphone compensation required by sections

<sup>1</sup> Formal Complaint of Verizon, File No. EB-05-MD-007 (filed May 13, 2005) (“Complaint”).

<sup>2</sup> Contel of the South, Inc. d/b/a Verizon Mid-States, Verizon California Inc., The Micronesian Telecommunications Corporation, Verizon Delaware Inc., Verizon Florida Inc., Verizon Maryland Inc., Verizon New England Inc., Verizon New York Inc., Verizon New Jersey Inc., Verizon North Inc., Verizon Northwest Inc., Verizon South Inc., Verizon Pennsylvania Inc., GTE Southwest Inc., Verizon Washington, D.C. Inc., and Verizon West Virginia, Inc. See Revised Joint Statement of Stipulated Facts, Disputed Facts, and Key Legal Issues, File No. EB-05-MD-007 (filed Aug. 8, 2005) (“Revised Joint Statement”) at 2, ¶ 4.

<sup>3</sup> 47 U.S.C. § 208.

<sup>4</sup> 47 U.S.C. §§ 201, 276.

64.1301(a) and (c) of the Commission's rules,<sup>5</sup> and by failing to pay certain presubscribed interexchange carrier ("PIC") charges imposed in Verizon's tariff. For the reasons discussed below, we grant Verizon's Complaint with respect to Commission rules 64.1301(a) and (c), and order OCI to pay damages in the amount of such compensation due, plus interest. We dismiss Verizon's PIC charges claim without prejudice to filing in an appropriate forum on the ground that it is a collections action and thus not cognizable under the Act.

## II. BACKGROUND

2. At all relevant times, Verizon was a Local Exchange Carrier ("LEC") and a payphone service provider ("PSP").<sup>6</sup> OCI was the PIC for thousands of payphones in the United States, including payphones owned by Verizon.<sup>7</sup>

3. Section 276 of the Act directs the Commission to "establish a per call compensation plan to ensure that all [PSPs] are fairly compensated for each and every completed intrastate and interstate call using their payphone . . . ."<sup>8</sup> Pursuant to section 276, the Commission established a per call compensation scheme, *inter alia*, for access code and subscriber 800 (collectively "dial-around") calls, and 0+ calls.<sup>9</sup> An "access code" call is a payphone call in which the caller dials a sequence of numbers that connects the caller to an interexchange carrier ("IXC") other than the payphone's PIC.<sup>10</sup> A "subscriber 800 call" is a payphone call to an 800 number assigned to a particular subscriber.<sup>11</sup> A "0+ call" is a payphone call in which the caller dials "0" plus the called number. A 0+ call is always automatically routed to the payphone's PIC.<sup>12</sup>

4. The Commission's per call compensation plan did not take effect, however, until October 7, 1997, the date on which carriers were required to install the call tracking technology necessary to

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<sup>5</sup> 47 C.F.R. § 64.1301(a), (c).

<sup>6</sup> Revised Joint Statement at 2, ¶¶ 2, 4.

<sup>7</sup> Revised Joint Statement at 2, ¶ 2; Complaint at 2, ¶ 2; Initial Brief of Operator Communications, Inc., File No. EB-05-MD-007 (filed Sept. 23, 2005) ("OCI Initial Br."), Exhibit 10 (Interrogatory and Document Request Responses) at Exhibit C (Table).

<sup>8</sup> 47 U.S.C. § 276(b)(1)(A).

<sup>9</sup> *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Report and Order, 11 FCC Rcd 20541 (1996) (subsequent history omitted) ("*First Payphone Compensation Order*"); *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Fourth Order on Reconsideration and Order on Remand, 17 FCC Rcd 2020 (2002) (subsequent history omitted) ("*Fourth Payphone Compensation Order*"); *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Fifth Order on Reconsideration and Order on Remand, 17 FCC Rcd 21274 (2002) (subsequent history omitted) ("*Fifth Payphone Compensation Order*").

<sup>10</sup> *First Payphone Compensation Order*, 11 FCC Rcd at 20549, ¶ 16 n.34.

<sup>11</sup> *First Payphone Compensation Order*, 11 FCC Rcd at 20549, ¶ 16 n.35. "[T]he term 'subscriber 800 calls' includes other sequences of numbers that the FCC deems, or may deem in the future, the equivalent of subscriber 800 numbers, such as numbers with an '888' code." *Id.*

<sup>12</sup> *Fourth Payphone Compensation Order*, 17 FCC Rcd at 2028, ¶ 21. 0+ calls include collect, credit card, and third number billing calls. See *First Payphone Compensation Order*, 11 FCC Rcd at 20549, ¶ 16 n.33.

implement the plan. Until that time, for the period April 16, 1997 to October 6, 1997 (the “Interim Period”), the Commission determined that PSPs would be compensated for dial-around and 0+ calls on a per-payphone basis.<sup>13</sup> Accordingly, the Commission promulgated rules 64.1301(a) and (c), obligating certain carriers to compensate PSPs for Interim Period dial-around and 0+ calls “per payphone per month.”<sup>14</sup>

### III. DISCUSSION

#### A. OCI’s Failure to Pay Interim Period Dial-Around Compensation Violates Section 201(b) of the Act.

5. We conclude that OCI violated section 201(b) of the Act by failing to pay Verizon dial-around compensation as required by Commission rule 64.1301(a).<sup>15</sup> That rule provides:

In the absence of a negotiated agreement to pay a different amount, each entity listed in Appendix A of the [*Fifth Payphone Compensation Order*] must pay default compensation to [PSPs] for [dial-around] calls for the [Interim Period] in the amount listed in Appendix A per payphone per month.<sup>16</sup>

As explained in the *Fifth Payphone Compensation Order*, Appendix A allocates Interim Period dial-around compensation to each of the carriers listed by estimating that carrier’s proportionate share of the payphone calls market during the Interim Period.<sup>17</sup> OCI’s assigned share is \$0.01776232 per payphone.<sup>18</sup>

6. The parties have stipulated that they did not have a negotiated agreement governing Interim Period compensation for dial-around calls, and that OCI has not compensated Verizon for any such calls.<sup>19</sup> In addition, the parties agree as to the number of Verizon payphones that were in service during the Interim Period.<sup>20</sup> Accordingly, Verizon has established each element of its rule 64.1301(a)

<sup>13</sup> See *Fourth Payphone Compensation Order*, 17 FCC Rcd at 2020-22, ¶¶ 1-4; *Fifth Payphone Compensation Order*, 17 FCC Rcd at 21276-79, ¶¶ 2-9.

<sup>14</sup> 47 C.F.R. § 64.1301(a), (c).

<sup>15</sup> See Complaint at 13, ¶ 50 (alleging that OCI’s failure to pay rule 64.1301(a) compensation violates sections 201 and 276 of the Act, and “Commission orders concerning payphone compensation.”) See also *Global Crossing Telecomm. v. Metrophones Telecomm.*, 127 S.Ct. 1513, 1520 (2007) (refusing to pay payphone compensation required by Commission rules violates section 201(b) of the Act).

<sup>16</sup> 47 C.F.R. § 64.1301(a).

<sup>17</sup> *Fifth Payphone Compensation Order*, 17 FCC Rcd at 21289, ¶¶ 47-48.

<sup>18</sup> See *Fifth Payphone Compensation Order*, 17 FCC Rcd at 21313 (stating that OCI is to pay \$0.01772023 per payphone per month) and 21315 (stating that ONCOR Communications is to pay \$0.00004209 per payphone per month). OCI admits, for the purposes of this litigation, that it is responsible for the obligations attributed to “ONCOR Communications” in Appendix A. See Revised Joint Statement at 7, ¶ 34.

<sup>19</sup> See Revised Joint Statement at 5, ¶¶ 25-26, 8-9, ¶¶ 38, 40-41. See Complaint, Tab F (Fouke Decl.) at 3, ¶ 9.

<sup>20</sup> Specifically, the parties agree that, (i) 493,230 Verizon payphones were in service in the second quarter of 1997, (ii) 479,272 Verizon payphones were in service in the third quarter of 1997, and (iii) 514,895 Verizon payphones were in service in the fourth quarter of 1997. See Final [sic] Brief in Support of Verizon’s Complaint, File No. (continued....)

claim.

7. OCI's defenses to this claim lack merit. First, OCI argues that Verizon "may not use the Commission's complaint process to collect debts . . . owed by customers for tariffed charges."<sup>21</sup> The Commission has distinguished between rules that impose an obligation to pay, and rules that merely permit a carrier to levy a charge. Failure to pay pursuant to the former is actionable under the Act, while failure to pay in the latter instance is not.<sup>22</sup> In the "collections action" cases on which OCI relies, the complainant sought amounts allegedly owed solely pursuant to tariff and, for that reason, did not state a claim for violation of the Act or Commission rules.<sup>23</sup> In this case, however, Verizon seeks to enforce compensation obligations explicitly imposed upon IXCs by Commission rules, and thus may bring the case here. The Commission has stated that, "failure to pay [payphone compensation] in accordance with the Commission's payphone rules . . . constitutes both a violation of section 276 and an unjust and unreasonable practice in violation of section 201(b) of the Act."<sup>24</sup>

8. OCI further contends that rule 64.1301(a) is unlawful because it is retroactive. Specifically, OCI argues that, "for the duration of what is now referred to as the Interim Period and through 2002, no effective FCC rules established a payphone compensation obligation from IXCs."<sup>25</sup> Therefore, according to OCI, the promulgation of these rules in 2002 (with the release of the *Fifth Payphone Compensation Order*) is improper retroactive rulemaking.<sup>26</sup> This very argument, however, (Continued from previous page) \_\_\_\_\_  
EB-05-MD-007 (filed Sept. 23, 2005) ("Verizon Initial Br.") Attachment 4 (Joint Statement of Additional Stipulated Facts) at 1, ¶ 1.

<sup>21</sup> Answer and Affirmative Defenses of Operator Communications, Inc., File No. EB-05-MD-007 (filed June 23, 2005) ("Answer"), Tab D (Legal Analysis) at 12-13 (citing *Illinois Bell Telephone Co. v. AT&T*, Memorandum Opinion and Order, 4 FCC Rcd 5268, *recon. denied*, 4 FCC Rcd 7759 (1989), *Beehive Telephone, Inc. v. Bell Operating Cos.*, Memorandum Opinion and Order, 10 FCC Rcd 10562 (1995), and *Long Distance/USA, Inc. v. Bell Telephone Co. of Pa.*, Memorandum Opinion and Order, 7 FCC Rcd 408 (Com. Carrier Bur. 1992)); OCI Initial Br. at 32-34 (same).

<sup>22</sup> See *U.S. TelePacific Corp. v. Tel-America of Salt Lake City, Inc.*, Memorandum Opinion and Order, 19 FCC Rcd 24552, 24556 n.28 (2004) ("[T]he Commission does entertain claims to recover unpaid payphone compensation pursuant to section 276 of the Act . . . and sections 64.1300 through 64.1320 of the Commission's rules . . . . Unlike the statutory provisions and Commission rules regarding access charges – which speak only to the duties of the charging carrier and not to the duties of the customer – section 276 of the Act and section 64.1300 of the Commission's rules specifically impose an obligation on the 'customer' to pay payphone compensation charges. Therefore, a failure to pay payphone compensation charges constitutes a violation of the Act itself, which is actionable under section 208.")

<sup>23</sup> See *Illinois Bell Telephone Co.*, 4 FCC Rcd at 5270, ¶¶ 15-18 (dismissing complaints alleging that defendant failed to pay tariffed rates for special access services on the ground that the Commission's complaint procedure is not "a collection mechanism for carriers"); *Beehive Telephone, Inc.*, 10 FCC Rcd at 10569, ¶ 37, n.90 (dismissing cross-complaint for amounts billed pursuant to tariff); *Long Distance/USA, Inc.*, 7 FCC Rcd at 412, ¶ 13 (dismissing cross-complaint seeking payment for tariffed switched access service charges). See generally *U.S. Telepacific Corp.*, 19 FCC Rcd 24552.

<sup>24</sup> *In re Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Report and Order, 18 FCC Rcd 19975, 19990, ¶ 32 (2003) (subsequent history omitted). *Accord APCC Services, Inc. v. NetworkIP, LLC*, Order on Review, 21 FCC Rcd 10488, 10494-95, ¶ 16 (2006). See *Global Crossing Telecomm.*, 127 S.Ct. at 1520 (violation of Commission payphone compensation rules violates section 201(b)).

<sup>25</sup> Answer Tab D (Legal Analysis) at 3-4.

<sup>26</sup> See Answer Tab C (Summary) at i, Tab D (Legal Analysis) at 2-5, Tab E (Answer and Affirm. Defenses) at 14-15, ¶¶ 76-78.

was considered and rejected by the Commission in the *Fourth* and *Fifth Payphone Compensation Orders*, and thus this defense is conclusively precluded. As the Commission explained there, it was not engaged in retroactive rulemaking, but rather was implementing the mandate of the D.C. Circuit, which directed the Commission to set a new interim rate for dial-around compensation.<sup>27</sup>

9. Verizon therefore has established that it is entitled to rule 64.1301(a) compensation from OCI. The parties in this case have stipulated to the amount of compensation owed to Verizon. Specifically, the parties agree that, if the number of Verizon payphones in service during the Interim Period is applied to the dial-around compensation amount attributed to OCI in Appendix A of the *Fifth Payphone Compensation Order*, OCI's liability to Verizon pursuant to rule 64.1301(a) is \$49,503 before the application of interest.<sup>28</sup> We so find.<sup>29</sup>

**B. OCI's Failure to Pay Interim Period 0+ Compensation Violates Section 201(b) of the Act.**

10. We also conclude that OCI violated section 201(b) of the Act by failing to pay Verizon 0+ compensation pursuant to Commission rule 64.1301(c).<sup>30</sup> That rule provides:

In the absence of a negotiated agreement to pay a different amount, if a [PSP] was not compensated for 0+ calls originating during the [Interim Period], ... an [IXC] to which the payphone was presubscribed during this same time period must compensate the [PSP] in the default amount of \$4.2747 per payphone per month during the same time period ....<sup>31</sup>

It is well established that the complainant in a section 208 formal complaint proceeding has the burden of establishing, by a preponderance of the evidence, that the defendant has violated the Act or Commission rules or orders.<sup>32</sup> Verizon and OCI stipulate that they have not negotiated an agreement governing compensation for 0+ calls, and that OCI has not paid Verizon any Interim Period 0+ compensation.<sup>33</sup> Verizon further submitted uncontroverted evidence that it received no compensation for the 0+ calls at

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<sup>27</sup> See *Fourth Payphone Compensation Order*, 17 FCC Rcd at 2022, ¶ 5 n.18; *Fifth Payphone Compensation Order*, 17 FCC Rcd at 21294, ¶ 62 (citing *Ill. Pub. Telecomm. Ass'n v. FCC*, 117 F.3d 555, 565, *clarified on reh'g*, 123 F.3d 693 (D.C. Cir. 1997), *cert. denied sub nom. Virginia State Corp. Comm'n v. FCC*, 523 U.S. 1046 (1998), in which the court, in vacating the Commission's rule governing compensation for dial-around calls, stated, "The FCC must now set a new interim rate ...").

<sup>28</sup> See Verizon Initial Br. Attachment 4 (Joint Statement of Additional Stipulated Facts) at 1, ¶ 2.

<sup>29</sup> Because Verizon will receive all the relief to which it is entitled under section 201(b) of the Act, we dismiss without prejudice Verizon's claims under section 276 of the Act and Commission orders.

<sup>30</sup> See Complaint at 13, ¶ 47 (alleging that OCI's failure to pay rule 64.1301(c) compensation violates sections 201 and 276 of the Act, and "Commission rules concerning OCI's payphone compensation").

<sup>31</sup> 47 C.F.R. § 64.1301(c).

<sup>32</sup> *Hi-Tech Furnace Systems, Inc. v. FCC*, 224 F.3d 781, 787 (D.C. Cir. 2000) (affirming the Commission's decision to impose the burden of proof on the complainant). See *Consumer.Net v. AT&T Corp.*, Order, 15 FCC Rcd 281, 284-85, ¶ 6 (1999); *Implementation of the Telecommunications Act of 1996, Amendment of Rules Governing Procedures to be Followed when Formal Complaints are Filed Against Common Carriers*, Report and Order, 12 FCC Rcd 22497, 22615, ¶ 291 (1997).

<sup>33</sup> See Revised Joint Statement at 5, ¶¶ 25-26.



issue here that originated during the Interim Period.<sup>34</sup> The parties disagree, however, as to the number of Verizon payphones that were presubscribed to OCI during the Interim Period.

11. In order to calculate the amount of 0+ compensation owed, Verizon relies on OCI records establishing, for each month of the Interim Period, the number of Verizon payphones that delivered at least one 0+ call to OCI.<sup>35</sup> OCI concedes that a payphone that delivered a 0+ call to OCI in a particular month must have been presubscribed to OCI for at least some portion of that month, because all 0+ calls are automatically routed to the payphone's PIC.<sup>36</sup> Based on this evidence, Verizon proffers three alternative methods for calculating the number of Verizon payphones presubscribed to OCI. We find that Verizon's third method accurately calculates the number of such payphones.

12. First, Verizon asks us to assume that if a Verizon payphone delivered at least one 0+ call at any time during the Interim Period, it must have been presubscribed to OCI for the entire five and a half months of that period.<sup>37</sup> Because the rules require monthly compensation regardless of whether any 0+ calls are carried, Verizon contends that OCI owes default compensation for each of those phones for each month of the Interim Period.<sup>38</sup> OCI argues, on the other hand, that the Verizon payphones could have changed PICs at any time during the Interim Period because the IXC market was highly competitive, slamming was pervasive and OCI's market share was in decline.<sup>39</sup> Though Verizon is correct that compensation is due regardless of whether 0+ calls were made, the conclusion that a phone was presubscribed to OCI for the entire five and a half month period based on a single call is too attenuated, and we decline to base an award of 0+ compensation on this assumption. As OCI notes, "where an issue is left in doubt by proof so that a trier of fact would be required to speculate, the party on which the burden of proof ultimately rests must lose."<sup>40</sup>

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<sup>34</sup> See Complaint, Tab F (Fouke Decl.) at 3, ¶ 9.

<sup>35</sup> See Verizon Initial Br. at 2 and Attachment 3 (Fouke Decl.) at 2-3, ¶¶ 5-7; Opposition Brief of Verizon, File No. EB-05-MD-007 (filed Oct. 7, 2005) ("Verizon Opp. Br.") at 3; Reply Brief of Verizon, File No. EB-05-MD-007 (filed Oct. 14, 2005) ("Verizon Reply Br.") at 1; OCI Initial Br. at 30-31, Exhibit 10 (OCI's Responses to Interrogatory and Document Production Requests) at 2-3. Specifically, in each month of the Interim Period, OCI carried at least one 0+ call from the following number of Verizon payphones: April: 21,513 payphones; May: 21,970 payphones; June: 21,424 payphones; July: 20,721 payphones; August: 20,033 payphones; September: 18,738 payphones; and October: 18,456 payphones. *Id.* OCI subsequently stated that its initial calculation was incorrect, and that it carried a slightly smaller number of 0+ calls from Verizon payphones during the Interim Period. See Opposition Brief of Operator Communications, Inc., File No. EB-05-MD-007 (filed Oct. 7, 2005) ("OCI Opp. Br.") at 8 and Exhibit A. OCI's attempt to revise the record was not substantiated by a declaration or affidavit, and therefore must be rejected.

<sup>36</sup> See OCI Initial Br. at 1, 30, Exhibit 10 (OCI's Responses to Interrogatory and Document Production Requests) at 2; OCI Opp. Br. at 6.

<sup>37</sup> See Verizon Initial Br. at 5-6; Verizon Opp. Br. at 2-7; Verizon Reply Br. at 1-2.

<sup>38</sup> *Id.*

<sup>39</sup> See Supplemental Responses to Answer and Affirmative Defenses, File No. EB-05-MD-007 (filed June 30, 2005) ("Supp. Answer"), Tab 1 (Hargrave Decl.) at 2-3, ¶¶ 6-10; OCI Initial Br. at 6-7, 11, 31-32; OCI Opp. Br. at i-ii, 3-8; Letter from Danny A. Adams, counsel OCI, to Secretary, FCC, File No. EB-05-MD-007 (filed Oct. 14, 2005) ("OCI Reply Br.") at 2-3.

<sup>40</sup> OCI Opp. Br. at 7 (citing *Clark v. Wilbur*, 913 F. Supp. 463 (S.D. W. Va. 1996), *aff'd*, 139 F.3d 888 (4<sup>th</sup> Cir. 1998)).

13. Second, acknowledging that some of the payphones may not have been presubscribed to OCI for the entire Interim Period,<sup>41</sup> Verizon asks us to assume that if at least one 0+ call from a Verizon payphone was delivered to OCI during a calendar quarter, then the payphone was presubscribed to OCI for that quarter.<sup>42</sup> For the same reasons, however, we find that there is an insufficient basis on which to determine that a phone was presubscribed for a calendar quarter based only upon proof that the phone was presubscribed to OCI during some point in that quarter.

14. Third, Verizon asks us to assume that if at least one 0+ call from a Verizon payphone was delivered to OCI during a particular month, the payphone was presubscribed to OCI for that entire month.<sup>43</sup> OCI concedes that these figures “indicate[], by a preponderance of the evidence, the *actual* Verizon payphones [for] which OCI was the presubscribed carrier.”<sup>44</sup> OCI nevertheless contends that Verizon has not established that the payphones remained presubscribed to OCI for the entire month and that, as a result, no 0+ compensation is due.<sup>45</sup> OCI argues that PIC changes could occur at any time, and that, therefore, “[i]t is not possible to tell whether OCI was the presubscribed carrier for the entire month, or only for a portion of the month.”<sup>46</sup>

15. Contrary to OCI’s position, however, rule 64.1301(c) does not require Verizon to prove that its payphones were presubscribed to OCI the entire month in order to recover.<sup>47</sup> The rule only obligates Verizon to demonstrate that OCI was the PIC at some point during the month,<sup>48</sup> which Verizon has done. Again, Verizon bases its claim for compensation on evidence that establishes the number of payphones that were presubscribed to OCI for at least a portion of each month of the Interim Period. Accordingly, we find that Verizon has established by a preponderance of the evidence the number of its payphones that were presubscribed to OCI each month of the Interim Period.

16. OCI further argues that Verizon’s claim should be denied because Verizon cannot show, as required by rule 64.1301(c), that it “was not compensated for 0+ calls originating during the [Interim Period].”<sup>49</sup> OCI does not assert that another carrier compensated Verizon for the payphones at issue. Rather, according to OCI, Verizon included a number of 0+ calls delivered from Verizon payphones to OCI in payphone call data submitted in the record of the *Fifth Payphone Compensation Order*

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<sup>41</sup> See Verizon Initial Br. 7, Tab 3 (Fouke Decl) at 4, ¶ 11.

<sup>42</sup> See Verizon Initial Br. at 7-9, Attachment 3 (Fouke Decl.) at 5-6, ¶ 15; Verizon Opp. Br. at 7-9; Verizon Reply Br. at 1-2.

<sup>43</sup> See Verizon Initial Br. at 9-11; Verizon Opp. Br. at 3, 9; Verizon Reply Br. at 1-2.

<sup>44</sup> OCI Initial Br. at 30-31 (emphasis in original).

<sup>45</sup> See OCI Initial Br. at 28 (“Although OCI does not dispute that some unknown number of Verizon payphones were presubscribed to OCI during the Interim Period, the exact number is not established by Verizon”); OCI Opp. Br. at 7-8; OCI Reply Br. at 1-2.

<sup>46</sup> OCI Opp. Br. at 7-8.

<sup>47</sup> 47 C.F.R. § 64.1301(c).

<sup>48</sup> See 47 C.F.R. § 64.1301(c) (“an [IXC] to which the payphone was presubscribed during this same time period must compensate the [PSP] ... per payphone per month during the same time period . . .”).

<sup>49</sup> 47 C.F.R. § 64.1301(c).

proceeding for the purpose of the Commission's Appendix A calculations.<sup>50</sup> OCI reasons that Appendix A thus overstates OCI's share of the payphone call market to the extent of these 0+ calls, thereby obligating OCI to pay excessive Interim Period dial-around compensation.<sup>51</sup>

17. OCI's argument is flawed. By definition, the figures included in Appendix A are utilized solely for purposes of determining an IXC's liability for dial-around, not 0+, compensation.<sup>52</sup> OCI's position, at best, is a challenge to Appendix A of the *Fifth Payphone Compensation Order* and, therefore, to OCI's obligation to pay dial-around compensation. Yet, OCI does not argue that Appendix A is unlawful and that Verizon's claim for *dial-around compensation* should be denied. Such a collateral attack on the *Fifth Payphone Compensation Order*, in any event, would be time barred.<sup>53</sup>

18. In sum, we find that OCI's defenses fail and that Verizon has established its claim for Interim Period 0+ compensation pursuant to rule 64.1301(c).<sup>54</sup> Applying the rule 64.1301(c) default amount to the number of Verizon payphones that were presubscribed to OCI during the Interim Period, OCI is liable to Verizon for Interim Period compensation in the amount of \$504,120.00, before interest.<sup>55</sup>

### C. Verizon's Claim for PIC Charges is a Mere Collections Action.

19. We dismiss without prejudice Verizon's claim that OCI's failure to pay Verizon's tariffed PIC charges for the period June 30, 2002 to October 1, 2003 violates section 201 of the Act.<sup>56</sup> As OCI argues, this claim is indeed a "collections action."<sup>57</sup> Although purporting to allege a violation of the Act, Verizon in fact states only an action for recovery of charges due under the terms of its tariff. Unlike the payphone compensation rules (requiring IXCs to pay),<sup>58</sup> the Commission's PIC charge

<sup>50</sup> See Answer, Tab D (Legal Analysis) at 6 and Exhibit 1 (Letter from Verizon to Secretary, FCC); OCI Initial Br. at 16-17, 23.

<sup>51</sup> See Answer, Tab D (Legal Analysis) at 6-7 ("Because this amount [due under Commission rule 64.1301(a)] is inflated by an amount reflecting OCI's 0+ calls, OCI compensates Verizon for 0+ traffic through this [rule 64.1301(a)] obligation .... Therefore, Verizon's claim for 0+ compensation should be dismissed"); OCI Initial Br. at 16-17, 23; OCI Opp. Br. at 9 n.29.

<sup>52</sup> See 47 C.F.R. § 64.1301(a) ("each entity listed in Appendix A of the [*Fifth Payphone Compensation Order*] must pay default compensation to [PSPs] for *payphone access code calls and payphone subscriber 800 calls* for the [Interim] [P]eriod...") (emphasis added).

<sup>53</sup> See 47 U.S.C. § 402(a); 28 U.S.C. § 2344 (any party "aggrieved" by a "final [agency] order may, within 60 days after its entry, file a petition to review the order in the court of appeals wherein venue lies").

<sup>54</sup> OCI also argues that Verizon's rule 64.1301(c) claim should be denied because it is a "collection action," and because rule 64.1301(c) is retroactive. See Answer Tab C (Summary) at i, Tab D (Legal Analysis) at 2-5, Tab E (Answer and Affirm. Defenses) at 14-15, ¶¶ 76-78; OCI Initial Br. at 32-34. We reject these arguments for the same reason we reject OCI's virtually identical arguments with respect to Verizon's rule 64.1301(a) claim. See *supra* at ¶¶ 7-8.

<sup>55</sup> See Verizon Initial Br., Attachment 3 (Fouke Decl.), Exhibit D (Table entitled "0+ Compensation Amounts").

<sup>56</sup> See Complaint at 14, ¶ 53 (alleging that OCI violated section 201 of the Act and Commission orders by refusing to comply with Verizon's tariffed PIC charges).

<sup>57</sup> See Answer Tab D (Legal Analysis) at 12-13; OCI Initial Br. at 35.

<sup>58</sup> See *supra* at ¶ 4.



regime permitted IXCs to assess the charge on payphone lines.<sup>59</sup> As the Commission recently reiterated, “the Commission does not act as a collection agent for carriers with respect to unpaid tariffed charges.”<sup>60</sup>

**D. Verizon is Entitled to Pre-Judgment Interest at the Applicable IRS Rate for Corporate Overpayments.**

20. Verizon is entitled to interest on the amounts owed it by OCI pursuant to rule 64.1301(a) and (c) at the applicable IRS rate for corporate overpayments, accruing on the second day of the second quarter following the quarter in which the calls were made. The Commission concluded in the *Fourth* and *Fifth Payphone Compensation Orders* that PSPs are entitled to interest on Interim Period compensation pursuant to rule 64.1301(a) and (c) at the applicable IRS rate for corporate overpayments.<sup>61</sup> The Commission also concluded that, in accordance with the quarterly payment system applicable to payphone compensation, interest would begin to accrue on the second day of the second quarter following the quarter in which the calls were made.<sup>62</sup> Accordingly, Verizon is entitled to such an award here.

21. OCI argues that the Commission should not award prejudgment interest, asserting that the “[f]acts described by Verizon do not demonstrate that an award of interest is warranted ....”<sup>63</sup> Yet, as discussed, the Commission has already explicitly held that PSPs such as Verizon are entitled to prejudgment interest. The Commission explained that such an accrual period was necessary to ensure that PSPs “receive[] full compensation for this period.”<sup>64</sup> Nor does OCI identify any “facts described by

<sup>59</sup> See Complaint Tab E (Legal Analysis) at 16 (citing *Access Charge Reform*, First Report and Order, 12 FCC Rcd 15982, 16019, ¶ 92 (1997); *Access Charge Reform*, Order on Reconsideration, 18 FCC Rcd 12626, 12627, ¶ 3 (2003)).

<sup>60</sup> *U.S. TelePacific Corp.*, 19 FCC Rcd at 24557, ¶ 11. We dismiss without prejudice because Verizon may seek to recover PIC charges from OCI in an appropriate forum, including federal district court, if it so chooses. See *id.* at 24555-56, ¶ 8. Cf. *Global Crossing Telecomm.*, 127 S.Ct. at 1520 (refusing to pay payphone compensation required by Commission rules violates section 201(b) of the Act); *NetworkIP*, 12 FCC Rcd at 10492-95, ¶¶ 12-16 (same).

<sup>61</sup> See *Fourth Payphone Compensation Order*, 17 FCC Rcd at 2032, ¶ 31 (“interest shall be paid on interim ... period compensation at the rate established under Section 6621 of the Internal Revenue Code, 26 U.S.C. § 6621”); *id.* at 2035, ¶ 37 (“the interest rate applied to the interim period ... [is] the applicable interest rate set by the IRS pursuant to Section 6621 of the Internal Revenue Code for refund obligations”); *id.* at 2032 n.89 (“Appendix C [of this order] provides IRS rates for the last quarter of 1996 through March 31, 2002 ...”); *id.* at Appendix C (setting forth the IRS rate for overpayments); *Fifth Payphone Compensation Order*, 17 FCC Rcd at 21307-08, ¶¶ 99-100 (refusing to reconsider the *Fourth Payphone Compensation Order* ruling that the IRS-prescribed interest rate applies to late payment of Interim Period compensation).

<sup>62</sup> See *Fifth Payphone Compensation Order*, 17 FCC Rcd at 21308, ¶ 101 (“[T]he IRS-prescribed interest rate will only begin to accrue after the date payment normally would have been rendered under the quarterly payment system applicable to payphone compensation. Consistent with our assumptions under prior orders, the IRS-prescribed interest rate for payments that should have been made the first quarter of the year will begin accruing on July 2 of the same year, for the second quarter of the year on October 2 of that same year, for the third quarter on January 2 of the next year, and for the fourth quarter on April 2 of the next year.”) (citations omitted).

<sup>63</sup> Answer Tab D (Legal Analysis) at 13-14.

<sup>64</sup> *In re Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Third Report and Order, and Order on Reconsideration of the Second Report and Order, 14 FCC Rcd 2545, 2636, ¶ 197 n.427 (1999).

Verizon” which would cause us to make an exception here.<sup>65</sup>

#### IV. ORDERING CLAUSES

22. ACCORDINGLY, IT IS ORDERED, pursuant to sections 1, 4(i), 4(j), 201, 208, and 276 of the Act, 47 U.S.C. §§ 151, 154(i), 154(j), 201, 208, 276, and sections 1.720-1.736 and 64.1301 of the Commission’s rules, 47 C.F.R. §§ 1.720-1.736, 64.1301, that the above-captioned formal complaint is GRANTED IN PART and DISMISSED WITHOUT PREJUDICE IN PART.

23. IT IS FURTHER ORDERED, pursuant to sections 1, 4(i), 4(j), 201, 208, and 276 of the Act, 47 U.S.C. §§ 151, 154(i), 154(j), 201, 208, 276, and sections 1.720-1.736 and 64.1301 of the Commission’s rules, 47 C.F.R. §§ 1.720-1.736, 64.1301, that, within 90 days of release of this Order, OCI shall pay Verizon (a) damages (i) pursuant to Commission rule 64.1301(a), 47 C.F.R. § 64.1301(a), in the amount of \$49,503.00, and (ii) pursuant to Commission rule 64.1301(c), 47 C.F.R. § 64.1301(c) in the amount of \$504,120.00; and (b) interest on such damages at the applicable IRS rate for corporate overpayments, accruing on the second day of the second quarter following the quarter in which the calls at issue were made, and continuing through the date of payment.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

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<sup>65</sup> OCI argues further that pre-judgment interest should not be awarded because “the Commission delayed for five years before establishing any compensation obligation in the first place.” Answer Tab D (Legal Analysis) at 13-14. We reject this argument for the same reasons we rejected OCI’s argument that rules 64.1301(a) and (c) are unlawfully retroactive. *See supra* at ¶ 8.

**CONCURRING STATEMENT OF  
COMMISSIONER MICHAEL J. COPPS**

Re: *Contel of the South, Inc. d/b/a Verizon Mid-States, et al. v. Operator Communications, Inc.*, File No. EB-05-MD-007

While I agree with the Commission's decision in this case and believe that the parties are entitled to a decision, I concur in this Order to point out that the period of uncompensated payphone calls at issue occurred over 10 years ago, and the Defendant has subsequently sold the majority of its corporate assets and no longer provides telecommunications services. Thus, the practical impact of today's decision appears to be somewhat limited. I therefore must question whether the damages awarded to the Complainants at this late date constitute merely a Pyrrhic victory.